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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 279

In the Matter of the Application of
CELIA WONG,
Petitioner,

against

MAURICE FINKELSTEIN, Chairman, and LOUIS TOTH, Individually and as Members of, and constituting the Temporary City Housing Rent Commission of the City of New York,
Respondents.

To review and annul the determination of respondents denying the application of petitioner for a Certificate of Eviction and for an Order to compel the issuance of such certificate, being a duty specifically enjoined upon respondents by law, pursuant to Article 78, Civil Practice Act.

RESPONDENTS' BRIEF IN OPPOSITION

This brief is submitted in opposition to the petition for the issuance of a writ of certiorari to review the order of the Court of Appeals of the State of New York which affirmed an order dismissing the proceeding.

Statement of the Case

The petitioner applied to the respondents, constituting the Temporary City Housing Rent Commission of the City

of New York, for a certificate of eviction on the ground that she desired in good faith to withdraw the premises from the rental market (fols. 39-42). The application was denied for the reason that it was not based upon a ground for which a certificate could be issued under the local law (fol. 76). In denying the application the Commission did not inquire into the truth or falsity of the allegations contained therein. For the purpose of the proceeding they were assumed to be true (fols. 103-105).

Thereafter, this proceeding was commenced under Article 78 of the Civil Practice Act. Though mandamus has been abolished in form, the relief theretofore obtainable by way of writ or order of mandamus is available in a proceeding under Article 78. Civil Practice Act, Section 1283; Laws of New York of 1937, Chapter 526. The character of this proceeding as one in the nature of mandamus is clearly indicated in the title given to it by the petitioner: "to compel the issuance of such certificate, being a duty specifically enjoined upon respondents by law" (fols. 14, 15). It is again indicated in the petition itself (fol. 48).

The respondents interposed as a separate defense that they were not authorized by law to issue a certificate on the ground upon which the petitioner sought one (fols. 69, 70).

Legislation Involved

Section U41-6.0 of the Administrative Code of the City of New York creates the Temporary City Housing Rent Commission of the City of New York. The section of the Code which governs evictions from apartments in the City is U41-7.0. The latter section provides that, except for non-payment of rent, no tenant shall be removed from any apartment unless the Commission shall certify that one or more of several grounds exist (U41-7.0c). Those grounds do not include the desire of a landlord to withdraw the premises from the rental market.

Opinions Below

It was the opinion at Special Term that insofar as the local law did not permit withdrawal of the apartment from the rental market, it was contrary to the provisions of the federal Housing and Rent Act of 1948, and, therefore, void. The order directed the issuance of a certificate. The opinion is reported at 193 Misc. 289.

The Appellate Division in the Second Judicial Department reversed the order and dismissed the proceeding on the ground that the local law did not authorize the issuance of a certificate on the basis upon which it was sought, and that such lack of authorization was not in conflict with the statutes or the Constitution of the United States. The opinion is reported at 275 App. Div. 686. It relied upon *Matter of Recknagel*, reported at 275 App. Div. 684.

In the Court of Appeals, the order below was affirmed on the point of procedure. It held that the local law, of which the petitioner complained, gave the respondents no authority to perform the act which the petitioner sought to compel. Accordingly, the Court refused to order the respondents to issue a certificate. The per curiam opinion stated: "We neither reach nor pass upon the constitutional objections advanced by appellant." The opinion is reported at 299 N. Y. 205.

POINT I

The order below was grounded entirely upon a point of procedural law. It is not subject to review by this Court because the point of procedure was a tenable, independent, non-federal ground broad enough to sustain the order.

a.

The petitioner has designated this proceeding as one to compel the performance of a "duty specifically enjoined upon the respondents by law". The relief prayed for was

an order directing the respondents to issue a certificate of eviction. It is a proceeding in the nature of mandamus. Accordingly, it must appear that the respondents have the authority to perform the act which is demanded of them.

The dismissal of the proceeding was affirmed for the reason that such authority did not appear. This is clearly stated in the opinion of the Court below, which cited prior opinions of the same Court to the same effect.

The petitioner's real complaint is not that the respondents have refused to issue a certificate, but rather that the local law does not authorize them to issue one on the ground upon which she relies. It is that omission which is alleged to render the local law unconstitutional. Indeed, that is the very point which the petitioner has attempted to establish in her brief. If that be so, her remedy would seem to be not that of compelling the issuance of a certificate, but rather that of proceeding as if a certificate were not necessary in her situation.

Such a remedy had already been suggested by a decision in a case in which the facts were essentially the same as those in the instant one and in which the ground of the decision was the same as that later used by the Court of Appeals herein. *Matter of Pardee,* 193 Misc. 269 (1948), affirmed without opinion 275 App. Div. 659 (1st Dept., 1949). The Court stated:

> "This is an application to compel the Temporary City Housing Rent Commission of the City of New York to issue a Certificate of Eviction to petitioner. The latter claims that she seeks in good faith to recover possession of the four story and basement private house owned by her for the immediate purpose of withdrawing it from the rental market.
>
> Local Law No. 66 of 1947, of the City of New York, authorizes the Commission to issue a Certificate of Eviction only in certain contingencies specified in paragraphs 1 to 4, inclusive, of subdivision c of Section U41-7.0 of the Administrative Code of the City of New York. Said paragraphs do not include authority to issue a Certificate of Eviction in a case where the owner

of property used for dwelling purposes seeks the eviction for the purpose of withdrawing the property from the rental market. To grant the present application would be to require the Commission to issue a Certificate in direct contravention of the local law. The Court may not direct the Commission to do something which it is not legally authorized to do. It is unnecessary in view of the conclusion reached, to consider the contention of petitioner that it would be unconstitutional to require her to obtain a Certificate of Eviction in order to procure possession of her own property for the purpose of withdrawing it from the rental market. Assuming, without deciding, that petitioner's contention is correct, her remedy is not an application to compel the Commission to issue a Certificate which the local law does not authorize it to issue. Her remedy would seem to be the institution of a summary proceeding or action to obtain possession of the property without the Certificate required by subdivision c of paragraph U41-7.0 of the Administrative Code, on the theory that the requirement of such a Certificate in a case where the owner seeks possession for the purpose of withdrawing the property from the rental market is unconstitutional. The unconstitutionality of the local law in requiring a Certificate of Eviction in cases other than those specified in paragraphs 1 to 4 of the subdivision c, would not, however, have the effect of authorizing the Commission to issue a Certificate in cases not specifically authorized by the local law."

It may be noted that the opinions of the New York courts are entirely consonant with the views of this Court as to what acts public officers may be compelled to perform. *Supervisors* v. *United States,* 85 U. S. 71, 77; *United States* v. *County of Clark,* 95 U. S. 769; *Ex Parte Rowland,* 104 U. S. 604.

Though the petition herein suggests that the ground of the decision below is untenable, the supporting brief contains the citation of not one case to indicate that the theory of the decision is a fallacious one, or that it is in conflict with other decisions. Nor has an attempt been made to show that the cases relied upon by the Court of Appeals do not support its decision in the instant case.

b.

The petition alleges that the non-federal ground is so bound up with constitutional considerations as to be incapable of separate determination. The petitioner's brief contains no cases in support of this proposition, and an examination of the rationale of the decision below shows its complete freedom from constitutional considerations. It was based, simply on the theory that the respondents did not have the authority to issue a certificate on the ground upon which the petitioner sought one, and that they could not be compelled to exceed their authority. The Court stated that it did not "reach nor pass upon the constitutional questions" presented by the petitioner. No attempt has been made to indicate in what manner a determination of a constitutional question was necessary to the decision, or why the ground of the decision was not broad enough to sustain it.

In the instant case no issue of evasion is presented. It would be another question if the decision below left the petitioner with no other means of voicing her constitutional grievances. However, one method has already been suggested, and no complaint has been made that others are not available.

Had the Court below attempted to base its decision upon additional grounds of a constitutional nature, the non-federal ground would, nevertheless, have been sufficient to preclude review. In *Doyle* v. *Atwell,* 261 U. S. 590, the relators were arrested for violation of an ordinance alleged by them to be unconstitutional. Habeas corpus was denied by the state courts on the ground that the ordinance was constitutional and on the further ground that habeas corpus was not, under the state practice, the proper method of testing its validity. This Court declined to review for the reason that the procedural grounds for the decision were broad enough to maintain it. Cf. *McCoy* v. *Shaw,* 277 U. S. 302; *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688.

c.

Review by this Court is improper where there is a tenable, independent, non-federal ground broad enough to sustain the ruling of the state court. *Fox Film Corp.* v. *Muller*, 296 U. S. 207; *Utley* v. *St. Petersburg*, 292 U. S. 106; *Broad River Co.* v. *St. Petersburg*, 281 U. S. 537; *Minneapolis, S. P. & S. S. M. R. Co.* v. *Washington Lignite Coal Co.*, 254 U. S. 370; *Petrie* v. *Nampa and Meridian Irrigation District*, 248 U. S. 154; *Enterprise Irrigation District* v. *Farmer Mutual Canal Co.*, 243 U. S. 157; *Wood* v. *Chesborough*, 228 U. S. 672.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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of Counsel.